Supreme Court, U.S.
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No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY, and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The corporate disclosure statement at page ii of the Petition for Writ of Certiorari dated January 19, 2001 is still accurate.

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INTRODUCTION

The Second Circuit's decision allowing federal courts to adjudicate nonfederal claims between aliens for acts occurring abroad, along with its unduly expansive approach to personal jurisdiction and its cramped view of *forum non conveniens*, converts the federal courts into international claims courts open to all disputes arising out of alleged human rights abuses occurring anywhere in the world. The Second Circuit has endorsed that result even though such disputes "can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches" and "pose special questions concerning the judiciary's proper role". *See Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995). This warrants the Court's attention.

That this is a "human rights" case does not diminish the significance or legitimacy of questions about the proper role of the federal courts. Despite the emotional nature of the allegations made against petitioners, we believe that we have calmly and fairly presented the issues in the Petition as important ones that the Court should address.[1] The fierceness of respondents' Opposition—with its repeated charges of "disingenuous[ness]", "serious misrepresentation", "false[] treat[ment]" and "gross[] distort[ion]" (Opp. at 9, 13, 14, 18)—underscores that they, too, appear to believe the issues are important, perhaps too important to them to risk any scrutiny of what the Second Circuit has done.

Respondents thus seek to avoid review by raising procedural objections; mischaracterizing novel legal rulings as "fact-specific application[s]"of settled law (Opp. at 2); and

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[1] United States opposition to the creation of the International Criminal Court shows that reasonable people can differ on the question of what tribunal should hear "human rights" cases. *See* Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. Times, July 18, 1998, at A3. Indeed, the Petition cited an article analyzing the disjunction between the U.S. refusal to subject its nationals to non-U.S. tribunals and the availability of U.S. courts to hear, under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, claims against non-U.S. citizens. (*See* Pet. at 4.)

abandoning the rationale of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). None of respondents' arguments provides a basis for denying the writ. The Petition arises in a routine procedural posture with a fully developed record. *See* Sec. I. The Petition seeks review, not of factual findings, but of legal rulings that conflict with decisions from other circuit courts. *See* Sec. II. And the exercise of subject-matter jurisdiction over this action, on the theory that *common law* claims for violation of international law arise under federal law, conflicts with long-standing Supreme Court precedent. *See* Sec. III.

I. The Petition is ripe for review.

Respondents' assertion that the Court should not review this case because it is "interlocutory" (Opp. at 1, 4, 8) and "premature" (Opp. at 2, 8) is without merit. This case is not interlocutory in the sense of involving an appeal from a nonfinal order of the district court. *Cf.* 28 U.S.C. § 1292 (authorizing such appeals under certain circumstances). The Petition seeks review of a circuit court's reversal of a district court's entry of a final judgment dismissing a lawsuit. (App. B-11.) Review in such a posture is entirely routine and underlies numerous decisions of this Court.[2]

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[2] Such review is especially appropriate where, as here, the questions involve "jurisdictional" doctrines such as *forum non conveniens*, personal jurisdiction and subject-matter jurisdiction, the benefits of which are lost if not resolved at a preliminary stage. The procedural posture here is identical to key precedents such as *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238 (1981) (reviewing circuit court's reversal of district court's pretrial *forum non conveniens* dismissal), *Gulf Oil v. Gilbert*, 330 U.S. 501, 503 (1947) (same), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107-08 (1987) (reviewing state supreme court's reversal of lower court's pretrial dismissal for lack of personal jurisdiction). *See also Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 125-26 (1974) (per curiam) (reviewing circuit court's reversal of district court's pretrial dismissal for lack of subject-matter jurisdiction). For a recent example, see *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240, 2001 WL 173556 (U.S. Feb. 21, 2001). Whenever the Court reviews such a case, it is possible that the petitioner would have prevailed on other grounds had the Court not acted. There is nothing remarkable about this fact, which neither counsels against review nor renders a ruling by this Court "advisory" (Opp. at 8).

Notwithstanding respondents' suggestion that the Court wait for "a fuller factual record" (Opp. at 8), the facts necessary for disposition of the issues are now a part of the record. There will be no further discovery on, or reconsideration by the lower courts of, the facts relevant to the rulings on personal jurisdiction and *forum non conveniens*.[3] And Question Four—whether claimed violations of the law of nations give rise to federal-question jurisdiction—is a purely legal one.

Finally, respondents are wrong in arguing that the Petition should be denied because Question Four was "neither raised nor resolved" below. (Opp. at 9.) As explained in the Petition (at 5-6), *Filartiga* compelled (and continues to compel) both the district court and the panel of the Second Circuit to exercise subject-matter jurisdiction.[4] Only this Court and the Second

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[3] Respondents' contention that the Court should stay its hand because they allege other grounds (not reached below) for personal jurisdiction (Opp. at 19) is without merit. It is not the practice of this Court to decline to review an otherwise certworthy issue simply because the lower court's decision might be justifiable on alternative grounds not yet considered below. *See, e.g., L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999) (deciding issue on which *certiorari* was granted and remanding for consideration of alternative grounds for affirmance); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999) (same).

[4] Accusing petitioners of "grossly distort[ing] the truth" in noting that *Filartiga* would require the district court to exercise subject-matter jurisdiction over this action on remand, respondents argue that statutory jurisdiction under the ATS might yet be found lacking (on the ground that respondents have not adequately pleaded a tort in violation of the laws of nations), thus making it premature for this Court to decide whether the exercise of jurisdiction comports with Article III. (Opp. at 9-10.) That is incorrect. As this Court has noted, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case". *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also Bell v. Hood*, 327 U.S. 678, 682 (1946). Petitioners' arguments before the district court (*see* Opp. at 10 n.6) go to the validity of respondents' claims that petitioners' actions violated international law, and therefore should not properly be viewed as challenges to statutory subject-matter jurisdiction. Accordingly, they do not counsel against this Court's review of Question Four. *See Steel Co.*, 523 U.S. at 92 (noting the failure to find "a single case

Circuit sitting *en banc* can reconsider *Filartiga*, and petitioners raised and argued the question on their petition for rehearing *en banc*.[5] In any event, questions of the federal courts' subject-matter jurisdiction are properly raised at any time. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (subject-matter jurisdiction "must be policed by the courts on their own initiative even at the highest level").[6]

II. The Second Circuit's decision involves important legal rulings that conflict with the holdings of other circuits.

By arguing that "the Court of Appeals engaged in precisely the kind of straightforward multifactor balancing that *Piper* and *Gilbert* mandate" (Opp. at 11), respondents have exposed an important error in the Second Circuit's *forum non conveniens* ruling. Under *Piper* and *Gilbert*, the *district court*

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in which this Court has . . . call[ed] the existence of a cause of action 'jurisdictional,' and decide[d] that question before resolving a dispute concerning the existence of an Article III case or controversy").

[5] The Second Circuit's refusal to reconsider *Filartiga* makes review by this Court particularly important. The Second Circuit is likely to be the locus of many ATS cases involving alien defendants, because this case allows foreign corporations listed on the New York Stock Exchange to be subjected to personal jurisdiction in New York and foreign dignitaries regularly enter New York to visit the United Nations, *see, e.g.*, *Kadic*, 70 F.3d at 237 (defendant served while visiting United Nations); Graham Rayman, *Zimbabwe Leader Sued*, Newsday, Sept. 9, 2000, at A3 (same); Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming From Tiananmen Crackdown*, N.Y. Times, Sept. 1, 2000, at A6 (same).

[6] Respondents' RICO claim does not, as they assert, provide two "alternative statutory bases for subject-matter jurisdiction" (Opp. at 9). A plaintiff cannot, through the inclusion of a "wholly insubstantial" claim "made solely for the purpose of obtaining jurisdiction", manufacture federal court jurisdiction where it is otherwise absent. *Steel Co.*, 523 U.S. at 89. The contention that RICO can be applied to the exclusively Nigerian conduct and effects alleged in the Amended Complaint is "so insubstantial, implausible, . . . [and] completely devoid of merit as not to involve a federal controversy". *Id.* Thus, if the Court were to grant the writ and conclude that respondents' international law claims do not provide a basis for Article III federal-question jurisdiction, the federal courts would lack jurisdiction (under 28 U.S.C. § 1331 or otherwise) over the entire action.

must perform that balancing, which the court of appeals may reverse only for abuse of discretion. (Pet. at 14.) Petitioners seek review not of the *Gilbert* balance struck by the district court,[7] but of the Second Circuit's erroneous legal justifications for upsetting the balance struck by the district court.[8]

As set forth in the Petition, these *legal* issues are twofold. *First*, the Second Circuit's holding directly conflicts with the holding in *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088 (9th Cir. 1998).[9] These cases cannot be reconciled by pointing, as respondents do (Opp. at 13 n.9), to the adequacy of the alternative forum; the *Piper* presumption involves an inquiry that is separate from that of the adequacy of the alternative forum. (*See* Pet. at 17.)[10] *Second*, the Second

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[7] The district court determined that the *Gilbert* factors balanced in favor of dismissal. (App. B-10 to B-11.) The Second Circuit's conclusion that in "[its] view", the *Gilbert* factors do not warrant dismissal (Opp. at 14 n.11), simply shows that the Second Circuit improperly second-guessed the district court. Respondents repeat this error in arguing that petitioners "failed to demonstrate the inconvenience of defending" in New York (Opp. at 12 n.7), "failed to demonstrate substantial interests favoring their preferred alternative forum" (Opp. at 13 n.9), "failed to establish that the *Gilbert* private and public factors balanced in favor of dismissal" (Opp. at 13 n.10), and "failed to do their job below" (Opp. at 15).

[8] Respondents' accusation that petitioners made a "serious misrepresentation" in stating that the Second Circuit concluded that the Torture Victim Protection Act and plaintiffs' U. S. residence outweigh the factors favoring trial in England (Opp. at 14) is wrong; respondents themselves quote language demonstrating that the Second Circuit did precisely that. (Opp. at 14 n.11.)

[9] In *Gemini Capital Group*, the Ninth Circuit, affirming dismissal in favor of trial in a foreign forum, held that residents of California filing suit in Hawaii were not entitled to the strong "home forum" presumption under *Piper*. The Second Circuit, reversing the district court's dismissal in favor of trial in England, granted that strong presumption to non-New York residents of the United States who filed suit in New York.

[10] Respondents' argument that Nigeria is an inadequate forum (Opp. at 13 n.9) misses the point because the district court dismissed this case in favor of trial in *England* (Pet. at 9). We note also that since the filing of this lawsuit, civilian rule in Nigeria has been reestablished, and a governmental

Circuit's holding that there is a special rule favoring receptivity of ATS cases (thereby disfavoring *forum non conveniens* dismissals) conflicts with the rule in other circuits as to the effect of a federal statute on a *forum non conveniens* inquiry. (*See* Pet. at 15.)[11] Accordingly, this Court should review the Second Circuit's decision on *forum non conveniens*.[12]

Similarly, there is nothing at all "routine" (Opp. at 15) about the Second Circuit's personal jurisdiction analysis. Respondents concede that the investor relations office exists *solely* to "promote petitioners' good relationships with existing

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entity, the Oputa Human Rights panel, has begun investigating the abuses of the prior regime. *See* U.S. Department of State, 2000 Country Reports on Human Rights Practices, Nigeria § 4 (Feb. 2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/af/index.cfm?docid=700. Indeed, respondent Ken Wiwa has filed a petition with the Oputa panel relating to the events giving rise to this lawsuit. *See id.* § 1(e).

[11] Respondents do not address most of the cases cited in the Petition. (*See* Pet. at 15-17.) Moreover, they themselves describe *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), as "clearly not[ing]" that *forum non conveniens* is "fully available" in ATS cases. (Opp. at 13 n.10.) In this case, by contrast, after having previously reserved judgment on whether the use of *forum non conveniens* in ATS cases would "frustrate Congress's intent to provide a federal forum", *see Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998), the Second Circuit limited use of the doctrine on the grounds that ATS cases are "our business" and there is "a policy favoring receptivity by our courts to such suits". (App. A-28, A-30.) Respondents err in asserting (Opp. at 14) that petitioners were "disingenuous[]" in observing that the Second Circuit relied on this policy in reaching its decision because the Second Circuit said it would have reached the same result in any event. The Petition itself makes clear (at 11-12) that the Second Circuit invoked alternative legal grounds for its ruling, but far from "disingenuously" ignoring the alternative ground, the Petition seeks review of both grounds.

[12] Respondents' assertion (Opp. at 12 n.8) that the Second Circuit should resolve any conflict between this case and *DiRienzo v. Philip Services Corp.*, 232 F.3d 49 (2d Cir. 2000), is a non sequitur. The two cases are consistent. Petitioners cited the *DiRienzo* dissent to show that the circuit split identified by petitioners has been recognized by at least one member of the Second Circuit, who disagrees with the Second Circuit's rule (and has suggested that review by this Court is desirable). (*See* Pet. at 19-20.)

or potential U.S. investors and to ensure ready access to U.S. capital markets". (Opp. at 17.) These are "NYSE-related" activities (*see* Br. of N.Y. Stock Exch., Inc. as Amicus Curiae ("NYSE Br.") at 10-11), and in any event do not constitute the sale, solicitation or promotion of products or services (*see* Pet. at 21-22). The Second Circuit's decision that such activities are sufficient under the Due Process Clause to support the assertion of general jurisdiction, an issue of law that has broad and significant consequences (*see* NYSE Br. at 4-8, 11-12), conflicts with the decisions of other circuit courts and state courts of last resort (*see* Pet. at 23).[13]

III. *Filartiga* involves an important ruling of law that conflicts with long-standing precedent of this Court.

The Court should review the Second Circuit's holding in *Filartiga* that a dispute between aliens involving alleged violations of international law "arises under the Laws of the United States" within the meaning of Article III. (Pet. at 5.)[14]

Apparently recognizing that *Filartiga* cannot be justified on its own terms, respondents argue that the ATS is an exercise of Congress's Article I power to create a cause of action that defines and punishes offenses against the law of nations. (Opp. at 22-24.) However, the Second Circuit expressly declined to "treat[]" the ATS "as an exercise of Congress's power to define offenses against the law of nations". *Filartiga*, 630 F.2d at 887. This is undoubtedly correct, for the text and historical context of the ATS demonstrate conclusively that it is a jurisdictional statute that does not create any substantive

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[13] Respondents' only effort to distinguish these conflicting cases is to say, *ipse dixit*, that "all involved isolated or occasional activity". (Opp. at 17 n.14.) That is simply incorrect, as the cases themselves make clear. (*See* Pet. at 23-24; Br. for U.S. Council for Int'l Bus. as Amicus Curiae at 19-20.)

[14] Respondents' assertion that the ATS "means just what it says" in granting statutory jurisdiction over claims by aliens for torts in violation of international law (Opp. at 20) misses the point. Petitioners argue not that the Second Circuit misapplied the ATS, but that the exercise of ATS jurisdiction in cases between aliens (*i.e.*, where there is no diversity jurisdiction) is inconsistent with Article III. (*See* Pet. at 5-6, 24-25.)

rights.[15] As such, the ATS does not give rise to statutory or constitutional federal-question jurisdiction. (*See* Pet. at 5 n.1.)[16]

The Second Circuit in *Filartiga* instead justified its assertion of Article III jurisdiction on the basis that common law claims for violations of international law arise under federal law. (*See* Pet. at 24.) *That* directly conflicts with an unbroken line of precedent of this Court. (*See* Pet. at 25.) Contrary to respondents' argument (Opp. at 22 n.21), the cases cited in the Petition do not support the principle that international law raises a federal question giving rise to subject-matter jurisdiction. In *Ker v. Illinois*, this Court held that it had "no right to review" a claimed violation of "the law of nations" because a federal question was not presented. 119 U.S. 436, 444 (1886). In *Huntington v. Attrill*, this Court explained that it would determine issues of international law in connection with a question under the Full Faith and Credit Clause (just as it will determine issues of contract law in connection with questions under the Contracts Clause), but emphasized that questions of international law are not federal law and the Constitution has "not authorized" them "to be reviewed by this [C]ourt". 146 U.S. 657, 683-84 (1892). And in both *Oliver American Trading Co. v. Mexico* and *New York Life Insurance Co. v. Hendren*, this Court held that it did not have federal-

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[15] The ATS is phrased in terms of "jurisdiction", and was originally phrased in terms of "cognizance" (*see* Pet. at 5 n.1), which means "jurisdiction", *see FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Moreover, the ATS was enacted as part of the Judiciary Act of 1789 (*see* Pet. at 5 n.1), and was codified as part of title 28 of the United States Code, entitled "Judiciary and Judicial Procedure". Such a statute is plainly not an exercise of Congress's power to define and punish offenses against the law of nations. *Cf. The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 451-52 (1851) (holding that "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's commerce power).

[16] Thus, this case is *not* about whether Congress can create a private right of action pursuant to its define and punish power. It assuredly can, as the Petition pointed out. (Pet. at 5 n.2.) But it did not do so in the ATS.

question jurisdiction to review defenses premised upon international law. 264 U.S. 440, 442-43 (1924); 92 U.S. 286, 286-87 (1875). Thus, the practice that respondents assert has prevailed for more than 210 years (Opp. at 22), has actually prevailed for only the twenty-one years since *Filartiga* disrupted nearly two centuries of settled practice. *See also* 5 Op. Att'y Gen. 691, 692 (1802) ("doubt[ing] the competency of the federal courts" to hear "an aggravated violation of the law of nations" in the absence of a congressional "statute recognizing the offence").[17]

Respondents' argument that claims for violations of international law should be considered part of the limited federal common law that is federal law in the Article III sense (Opp. at 25 & n.25) is also wrong. The Petition (at 26 n.17, 27 n.18) explains briefly why this is so, and the issue would, of course, be more fully argued in the merits briefs. What is critical at this stage is that respondents cannot point to any holding of this Court to support their contention, which is not surprising given that their contention directly conflicts with

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[17] The irreconcilable conflict between *Filartiga* and this Court's precedents makes this case appropriate for *certiorari* review even absent a conflict among the circuits. Moreover, respondents are wrong in arguing (Opp. at 22 n.20) that the separate opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), do not conflict with *Filartiga*. (*See* Pet. at 28-29.) Respondents do not dispute that Judge Robb called *Filartiga* "fundamentally at odds with . . . the role of United States courts", 726 F.2d at 826 n.5 (Robb, J., concurring), and their claim that Judge Bork "took pains to point out" that his opinion did not conflict with *Filartiga* (Opp. at 22 n.20), is wrong. Judge Bork noted that "not all" his analysis "would apply to deny a cause of action to the plaintiffs in *Filartiga*", but concluded that *Filartiga* is a "fundamentally wrong" decision that "must be rejected for several reasons", and attacked its rationale as a conclusion he "cannot accept". 726 F.2d at 801, 810-11, 820 (Bork, J., concurring). Respondents' citation to this Court's denials of *certiorari* in *Tel-Oren* and other ATS cases (Opp. at 21 n.19) does not help them because, as respondents themselves recognize (Opp. at 8 n.4), denial of *certiorari* imports no expression of opinion upon the merits. In any event, the petitions in those cases did not address the inconsistency between *Filartiga* and this Court's precedents.

multiple decisions of this Court.[18] It is the prerogative of this Court—not the Second Circuit, "the considered view of the American Law Institute[]" or "a long list of experts" (Opp. at 26)—to decide whether more recent jurisprudential developments warrant a departure from the Court's settled precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a Writ of Certiorari should be granted.

March 5, 2001

Respectfully submitted,

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[18] The cases cited by respondents (Opp. at 25 n.25) do not show that international law provides a basis for federal-question jurisdiction. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 502 (1988), which has nothing to do with international law, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964), which actually supports petitioners' argument (*see* Pet. at 26 n.17), and *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 615 (1983), were all in federal court on diversity jurisdiction. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981), was an antitrust case, and *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972), involved a dispute between states involving the pollution of interstate waterways.